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Supreme Court of the United States.

THE BOSTON SAFE DEPOSIT AND TRUST COMPANY,
Appellant,
vs.
THE CITY of GRAND HAVEN, ALVAH L. HOLMES, and THE GRAND HAVEN WATER WORKS.

October Term, 1892.

No. 113.

Appeal from the Circuit Court of the United States for the Western District of Michigan.

BRIEF FOR APPELLANT.

A. HOWELL,
Of Counsel.

DETROIT:
JOHN F. EBY & CO., PRINTERS.
1892.

IN THE

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PARTIES.

The Appellant—The Boston Safe Deposit and Trust Company is a corporation of the State of Massachusetts, having its place of business in Boston.

The City of Grand Haven is located in the State of Michigan; Alvah L. Holmes is a resident of that city, and the Grand Haven Water Works is a corporation of Michigan, having its place of business in the same city.

STATEMENT OF THE CASE.

The Grand Haven Water Works of the city of Grand Haven, Michigan, in pursuance of a statute of that State and of a contract with said city, constructed a system of water works therein for the supplying of the city and its inhabitants with water; and mortgaged the same to complainant to secure money borrowed for their construction. And this suit is brought to restrain the city from now building and supplying water from works of its own to the injury and destruction of complainant's mortgage security.

On the 12th of April, 1883, the city of Grand Haven, Michigan, had a population of about, but not to exceed 6,000.

Its means of water supply consisted of a small water works plant, with about 2,500 feet of water pipe connected therewith, but were inadequate to the wants of the city. Water works were needed to furnish a better supply.

But the common council did not deem it prudent for the city, under the powers granted in its charter, to construct such works.

Therefore, on said 19th day of April, 1883, the council, in order to authorize and induce some private corporation to construct works and furnish the needed supply, passed a resolution, in pursuance of act 113 of the laws of 1869 (Chapter 84 of Howell's Statutes), to the effect that it was

expedient to have water works constructed for the purpose of supplying the city and its inhabitants with water, but that it was inexpedient for the city, under the powers granted in its charter, to build such works.

In September following the Wiley Construction Company, induced thereto by said resolution of the council, proposed to the city to organize a corporation to construct water works and supply the city with water upon terms and for privileges specified in the proposition.

The proposition was accepted by the council, and the proposed corporation was organized under said chapter 84 of said statutes, by the name of the "Grand Haven Water Works."

November 8, 1883, the city and company entered into a contract embracing the terms of said proposition, wherein the company agreed to construct works, to be completed by the 1st of July following, and to furnish the city with water for twenty-five years upon the terms and for the privileges named in the proposition. And the city, in consideration of the covenants of the company, granted to it the right to construct its works and lay its pipes in the streets and other public places of the city, and agreed, upon the performance by the company of its agreements, to pay it a yearly water rent of $4,200 during the life of the contract.

Upon the making of said contract the company immediately entered upon the construction of said works.

November 30, 1883—The company, under the enabling provisions of said chapter 84, executed to complainant as trustee a mortgage upon all its franchises, property, rents and income, to secure 70 bonds of $1,000 each, issued to raise money used in the construction of said works.

Said bonds were immediately sold on the market.

June 19, 1884—The city extended the time for the completion of the works to the first of September, 1884.

The works were, however, completed in the latter part of September, or in the early part of October, 1884.

Since, on or about the 1st of November, 1884, and up to the time of filing the bill in this cause, the company has furnished and supplied good and wholesome water to all the people of the city desiring the same, at such reasonable rates and charges as are provided for the said contract, and to the public schools and to the city of Grand Haven itself, and for fire protection and all other purposes for which it has desired to use it, and the same has been accepted and received by the city from the company; but for which the city has never made any payment.

During the year 1887 the city determined to construct water works for itself, and to supply itself and its inhabitants therefrom, and has commenced and is now engaged in the work, employing the defendant Holmes for that purpose. And is offering to supply water to citizens at rates below the company's rates, and far below what the company can supply water for, and, in fact, below the cost of furnishing the same, and has commenced so to do; and is by that means drawing away the company's patronage.

The bill alleges that the company has made a substantial compliance with its agreements.

That since the completion of said works it has at all times been, and now is, ready, able and willing to supply said city and its inhabitants with water in accordance with said agreement, and otherwise to perform all its agreements with said city, and intends so to do.

That the population of the city is not sufficient to maintain two systems of water works.

That said bonds are outstanding and unpaid, and the interest thereon is largely in arrear.

That the building of works and supplying of water therefrom by the city to its citizens is contrary to the agreements, understandings and rights under which the company has

constructed its works, and upon the faith of which the bondholders advanced their funds, and will by drawing away patronage from the company, greatly injure and depreciate the value of said mortgage security, and work irreparable injury to said bondholders; and will be in bad faith and fraudulent as to said company and the holders of said security.

And that the city is equitably estopped from so doing.

That before filing the bill in this cause the complainant requested said company to restrain the city from depreciating and destroying said mortgage security, by the construction and operating of said proposed city works.

But that the company failed so to do.

Prayer for injunction to restrain the city from constructing works and supplying water therefrom to its citizens to the injury of said mortgage security.

DEFENSE.

The answer (see Record, p. 45) admits the making of said contract between the city and said Water Works Company, but

Alleges that the city had no power to make the contract.

That on September 4, 1884, the said works being not yet completed, the city, by resolution of that date, forfeited said contract for non-performance.

And admits that the city has determined to construct and extend a system of water works of its own throughout the city and to supply itself and its inhabitants therefrom, and that it is engaged in so doing.

And prays the benefit of a demurrer.

ERRORS.

Bill dismissed for want of jurisdiction.

Brief for Apellant.

I.

The Grand Haven Water Works was incorporated, and said contract between it and the city was made under and by authority of a general statute of the State, passed in 1869, and amended in 1873, entitled "An act to authorize the formation of companies for the introduction of water into towns, cities and villages in the State of Michigan."

Sec. 1, Howell's Statutes, Chap. 84.

This statute first provides in section 3110 that it shall be lawful to organize a company for the construction of water works, and the supply of water therefrom in any town, city or incorporated village whenever the common council of the city or village or the municipal authority of the town shall, by resolution, declare that it is expedient to

have works constructed for supplying the city, village or town and its inhabitants with water, but that is expedient for such city, town or village under the power granted in its charter to build such works.

Section 3115 provides, that any corporation formed under this act shall have power to introduce water into any town, city or village in the state named in its articles of incorporation, etc.

Section 3124 provides, that whenever any such company shall be organized it should be the duty of the common council to grant to it the right to use the streets and public grounds of the city for the construction of proper works for the supply of water to the city and its inhabitants. And may prescribe such reasonable terms and restrictions in the use of streets and in the charging and collecting of tolls and compensation for water supplied to the city and its inhabitants as may be proper to guard against the improper use of the streets and to protect the city and its inhabitants from excessive charges for water supplied. *But no such restriction shall be imposed which will prevent such company from realizing upon its capital stock an annual income or dividend of 10 per cent after paying the cost of all necessary repairs and expenses, interest on all moneys borrowed, and 5 per cent per annum into a sinking fund for the extinguishment of funded debts.*

Section 3121, as amended in 1873, provides that the municipal authorities of the city or village may contract and agree with such company for the supply of water for public, municipal or other purposes, and for the time and mode of payment, and may issue their obligations therefor.

Section 3125 provides that, after the lapse of 25 years from its organization, the common council shall have the right of purchasing from the company all its property and all of its franchises and corporate rights.

Section 3126 provides that such city or village may

become a stockholder in the company after the electors shall have voted in favor of so doing and on the amount of stock to be taken. And also, that any gas manufacturing company, or other corporation of the State doing business therein, may become a stockholder in the company. And further provides that the city or village may raise money by 8 per cent bonds, payable as the common council shall direct. And, *in addition to the power of taxation given by its charter*, may levy taxes to the extent of 2 per cent of the annual assessed valuation to meet the principal and interest of the bonds.

Section 3127 provides that the Water Works Company may borrow money on mortgage and bonds for the purpose of raising money for the purpose of construction.

That such resolution (see "Schedule A" to bill, Rec., p. 15), as is provided for in said section 3110, was passed by the common council of Grand Haven; and that the contract between said council and the Grand Haven Water Works, set up in the bill (see "Schedule B" to bill, Rec., p. 15), was duly executed, is admitted in the answer. (Par. 3 and 7, printed Rec., pp. 45–46.)

II.

The cities and villages of Michigan may construct works, and supply themselves and their inhabitants with water, under the powers granted to them in their charter for that purpose; or they may procure such supply from private corporations organized for such purposes, under the provisions of said chapter 84 of the statutes.

Any city may avail itself of the latter method whenever its common council shall deem it expedient to have works

constructed for the supplying of itself and its inhabitants with water, but that it is inexpedient for the city itself, under the powers granted in its charter, to construct them, and shall pass a resolution to that effect, as provided in section 3110 of said chapter.

So long as a city chooses to provide such supply itself, under its charter powers, its right to do so is exclusive.

Upon this point, and in construing said statute, the State courts hold that until the passage by the council of this resolution, no corporation can be organized to supply water in the city, nor even exist; nor can the city make any contract with any such company for such a supply.

Atty.-Gen. vs. Hanchett, 42 Mich., 436.

It is only when the common council, by authority of the statute, has, upon due consideration, resolved that the city has not sufficient power under its charter to provide the needed supply, that the statute authorizes the organization of a company, and empowers it to construct works, and perform thereafter for the city that service which the city has declared in said resolution that it has not the power to perform for itself and its inhabitants. And requires the city to grant to it such privileges in the street and public grounds as will enable it to perform that service.

Consequently, when a city has, by the passage of such resolution, adopted the statutory method of supply, and has contracted therefor with a company duly organized for that purpose, its charter powers for constructing works and supplying itself and its inhabitants will be suspended and superseded during the life of the company's franchise, or, at least, during the term of such contract. And the powers which were previously exclusive in the city will be thenceforth exclusive in the company.

That it was the intention of the Legislature that the right to supply water, when vested in the company, should be

exclusive, is also evident from the provisions of the statute as to the time and manner in which the city may resume the right to supply water and acquire the property and franchise of the company used for that purpose, which are as follows: "From and after the expiration of twenty-five "years from the time of the organization of such company, "the common council of the city, town or village for "which the said company may have erected its works, shall "have the right and privilege of purchasing from such "company all its buildings, reservoirs, fixtures, apparatus "and property of such company, with all its *corporate* "*rights and privileges*, at such price as may be agreed "upon," etc. And in case of a failure to agree upon a price, the company is required to sell at an appraisal, etc. (See Sec. 3125 of the Chap. 84.)

If, after the organization of the company and its contract with the city, the latter still retained the right and privilege of supplying water, it could resume that service for itself and its people at its convenience. And there would be no reason or propriety for this provision of the statute for the purchase of the company's corporate rights and privileges.

Evidently, from the provisions of the statute, it was the intention of the Legislature that the company's rights to supply water should, as between it and the city, be exclusive. This is fairly to be implied.

The intention of the law maker is the law.

III.

It was competent for the *Legislature* of Michigan to confer upon water works corporations the exclusive power to construct works for the purpose of supplying a city with water; that is to say, to confer upon a private corporation the same power conferred upon the public cor-

poration, the municipality, subject, of course, to alteration or repeal by a future legislature under the provision of the Michigan constitution. And it was competent to provide that the charter power to provide water possessed by a city should be divested for twenty-five years, and vested in a private corporation, and that it should be as exclusive in the private corporation *as it had been* in the city; and that the power vested in the private corporation should be not only exclusive of all other private corporations, but also of the municipality itself as well.

And the *Legislature* may also bind the State, by contract, not to impair the exclusive right by subsequent legislation. And it may *empower* a municipality to do the same thing. And if an exclusive right is granted to a corporation, by the *law under which it is formed*, and the corporation, on its part, assumes obligations in favor of the public, it will be held that the Legislature or the municipality, acting under power received from the Legislature, *intended* a grant to be secured by contract.

These principles have been applied to railroad companies, bridge companies, to gas companies, slaughter-house companies and to water companies, such as that under discussion in the present case. That is to say, it has been held that the State may give a railroad company the exclusive right to build and operate between given points; or to a bridge company the sole right of maintaining a bridge over a stream within designated limits; or to a water company the monopoly of supplying a city with water at reasonable rates, or rates fixed by the city; or may confer upon a municipality the power to do this.

2 Morawetz on Corporations, 2d ed., Sec. 1057.
Cooley on Torts, p. 277.
The Binghamton Bridge, 3 Wall., 51.
Gibbons vs. Ogden, 9 Wheaton, 74.
The Slaughter House cases, 16 Wall., 65.
New Orleans Gas Co. vs. La. Light Co., 115 U. S., 650–665.

Com. vs. Lowell Gas Co., 12 Allen, 77.
Louisville Gas Co. vs. Citizens' Gas Co., same, 683.
Grand Rapids E. Light Co. vs. Grand Rapids E. E. Light Co., 33 F. R., 659-669.
New Orleans Water Works Co. vs. Rivers, 115 U. S., 674.
Boston R. R. Co. vs. Salem R. R. Co., 2 Gray, 1-32-34.
Atlantic City Water Works vs. Atlantic City, 39 N. J. Eq.
City of Louisville vs. Weible, 1 Southwestern Rep., 605.
Alpin vs. City of F. R., 32 F. R., 503; Field, J. (Inj)
Citizens Water Co. vs. Bridgeport Hydraulic Co., 10 Atlantic Rep., 170.
Coast Line Co. vs. City of Savannah, 30 P. R., 646.

The grant of a monolopy to a water company to supply a city with water is impaired by a grant of authority to an individual to lay pipes for the purpose of supplying water for his own use. This was held by the Supreme Court in the New Orleans case above cited in the 115th U. S., and an injunction was granted as prayed in the case at bar. And the Supreme Court has since twice affirmed the doctrine in the following cases:

St. Tammany Water Works vs. New Orleans, 120 U. S., 64.
Here a competing company was enjoined in C. C. U. S.
New Orleans Water Works, 8 Sup. Ct. Rep., 743 (mid).

In several instances, in the legislation of Michigan, franchises have been authorized to be granted by municipalities, and have been expressly made *exclusive, after acceptance.*

See Tram Ry's, How. Stat., § 3527.
Street Ry's, How. Stat., § 3549.
See note to Stein vs. Bienville W. W., 34 F. R., 153.

The State may authorize the municipality to abdicate its power, and the State did this by the said act of 1869, How. Stat., Chap. 84.

Gale vs. Kalamazoo, 23 Mich., 344.

A resolution or enactment of a municipality is such an exercise of legislative power, delegated by the State to the municipality, as that it may be held to be a law impairing the obligation of a contract.

8 Sup. Ct. Rep., cited.
Saginaw Co. vs. Saginaw, 28 Fed. Rep., 529.

IV.

And further, as to whether under said Chap. 84, and the proceedings had, the Grand Haven Water Works *is* vested with an exclusive franchise as against the city—that is, whether the *State* has *exercised* its *power* to grant such a franchise.

Manifestly, an exclusive power is granted by the Legislature to the water works company, which is also exclusive against the municipality. Such a grant, without express words, is exclusive against all persons but the State.

Jersey City Gas Co. vs. Dwight, 29 N. J. Eq., 241.

The franchise of the Grand Haven Water Works proceeds from the Legislature (How. Stat., Chapter 84), and the franchise does not proceed from the municipality.

By operation of that statute, and of the resolution of the municipality of April 12, 1883, provided for in the statute, sec. 3110 (Schedule A to bill), the franchise of the city to build water works was divested out of the city and vested for 25 years exclusively in such company as should thereafter be formed and contracted with by the city.

This divestiture is for twenty-five years, or until such time after the lapse of that period as the city may elect to BUY BACK the corporate rights which become vested in the company, together with its property.

Plainly, if the Legislature had intended that the city should retain the franchise of building water works, it would not have provided in section 3125 that the city might after the lapse of a certain period buy the franchise of the company.

Plainly, *also*, the franchise of the city under its charter to build water works *while it remained in the city* was exclusive in it.

Then, when the common council adopted the resolution of April 12, 1883, provided for and authorized by the statute in section 3110, it became lawful to form a corporation to become vested with and to exercise the franchise *theretofore* existing in the city; and the resolution operated to disable the city from exercising the franchise, after it had been accepted by the company, until it should re-purchase the same from the company, which might have received it under the enabling resolution.

Attorney-General vs. Hanchett, 42 Mich., 436.
Dartmouth College vs. Woodward, 4 Wheaton, 818.
N. O. W. vs. Rivers, 115 U. S., 881.

The State statute and the resolution of the city, accepted and acted upon by the company, *was a contract by the State and city* that the company should have the right and privilege of supplying water to the city and its inhabitants for 25 years, or until such time in its corporate life as the city under said section 3125 should purchase of it its right and privilege of furnishing such supply. And was a further contract that the city should not exercise its charter power to furnish water during the same period. And the statute, section 3124, having prohibited the city from placing any restric-

tion upon the company that would prevent it from realizing an annual income dividend of 10 per cent upon its capital stock, the statute and said resolution was a contract that the city would not do that which would directly or indirectly prevent the company from realizing such dividend. And yet the action of said city in constructing its works and in supplying water therefrom at rates below cost (see Record, p. 141), whereby the company is deprived of such reasonable earnings as were necessary to provide said dividend, is in violation of such agreement and understanding.

Special power is conferred in section 3121 that the city may bargain with the company for water, and the city *is compelled* to grant the use of its public grounds and streets to the company, by section 3124; and it is not possible to hold that the city may *itself* use the streets, after the duty has been laid upon it by the Legislature, to convey the use of the streets to the company, and that duty has been performed. The Legislature has the same power over the streets of the city that it has over the other highways of the State, and had the power to grant, and by chapter 84 *did* grant the use of the streets to the company, which use is *necessarily* exclusive both of the city and of other persons and corporations.

> The City of Atlanta vs. the Gate City Gas Company, 71 Ga., 106.
> Jackson, Cir. J., G. R. Co. vs. Id., 33 F. R., 668, 669.

It was held by the New Jersey Chancery Conrt that a franchise granted by the Legislature in a water works case, is exclusive by *necessary implication*. That the purpose for which it is granted shows this to be so. That the franchise is bestowed for a single objet, not attainable unless the franchise is exclusive in its nature. I give the facts of this case as given below under another head, and the lan-

guage of the chancellor with reference to the necessary implication of a monopoly is found near the end of the opinion.

Atlantic City Water Works vs. Atlantic City, 39 N. J. Eq., 367 (1885).

This construction of a legislative grant is approved by Judge Jackson in 33 Fed. R., p. 676, bottom.

This statute was intended to meet that class of cases where cities and villages have not the adequate charter power to provide themselves with needed water supplies, and its benefits were plainly intended as well for these municipalities whose conditions and populations are such that no company could afford to construct and operate works for their supply unless they could have the exclusive enjoyment of all the patronage that the locality affords.

We have shown above that franchises, *as to matters of which the public may assume control*, may be granted exclusively by *the Legislature*, unless there is some *constitutional* provision limiting legislative control of the matter, and there *is none* in this case. The reserved power of repeal does not affect the question. And *all* the cases which are collected by the other side, some of which are found in the Saginaw case, 28 Fed. Rep., 529, and note, and are referred to in the Grand Rapids case, 33 F. R., 669, are cases where the franchise was granted *by the municipality*, no power having been conferred by the State itself upon the municipality to make the grant. No question of that kind is raised in this case.

Mr. Justice Davis says, with reference to such monopolies, in the Binghamton Bridge case, 3 Wall., 74: "The Legislature, therefore, says to public spirited citizens: If you will embark with your time, money and skill, in an enterprise which will accommodate the public necessities, we will grant to you for a limited period, or in perpetuity, privileges that will justify the expenditure of your money,

and the employment of your time and skill. Such a grant is a contract with mutual considerations, and justice and good policy alike require that the protection of the law should be assured to it."

And it is submitted to this Court that, by a proper construction of said chapter 84, it confers upon the water company a franchise for supplying water to the municipality, which is exclusive as against the municipality itself, whenever the municipality, by resolution, has abdicated its own power, and the company, by contracting to supply the city, has accepted and acted on the abdication.

In a similar case, where the term exclusive was not actually used (as it is not used in chapter 84), it was held by the Supreme Court of Texas that the franchise was exclusive.

City of Brenham vs. The Brenham Co., 4 S. W. Rep., 143.

It results that the various resolutions of the city which operate to impair and take away the exclusive right of the Grand Haven Water Works are laws of the State, which affect the obligation of the contract within the meaning of the federal constitution and the State constitution as well, which latter contains a provision exactly like that of the federal constitution.

Mich. Const., Art. IV., Sec. 43, 1 Howell Stat, p. 48.

Butchers' Co. vs. Crescent Co., 111 U. S., 749 (3d par. from bottom).

In this last case Mr. J. Miller says that *the ordinance of the city of New Orleans impaired the obligation of the State contract by taking away the exclusive right of the company, granted for twenty-five years, which was to the company the most valuable thing supposed to be secured to it by the* STATUTORY CONTRACT.

Cir. J. Jackson emphasized the distinction between grants

by the Legislature and grants by the municipality (33 F. R., 669).

The complainant's franchise is not an exclusive privilege or monoply in that sense which indicates a power to oppress and wrong its patrons, by excessive charges and unreasonable exactions. The statute expressly authorizes the city in granting the use of its streets to prescribe such just and reasonable terms, restrictions and limitations upon the company as it may deem proper to guard against the improper use of such streets, etc., and to protect the city and its inhabitants from the imposition of undue and excessive rates or charges for water supplied (How. Stat., Section 3124).

And this same section prohibits the city also from imposing such restrictions upon the company as will destroy the value of its property, by cutting off its profits or reducing them below a given scale.

And we submit that if the city may not directly destroy the value of the company's works, by imposing restrictions that will deprive it of a reasonable income, it may not do so indirectly by the construction of other works, and thereby depriving it of the necessary patronage for its support. So long, at least, as the company is able, ready and desirous of supplying water to the city and its inhabitants in accordance with its contract, as this company is and always has been.

V.

In view of the foregoing, the position of the answer that the contract of the city with the company was *ultra vires* is without foundation.

The resolution and contract are authorized by chapter 84 in express terms.

It is true that the city has no power in the premises *except* that which is conferred by the Legislature, expressly or by necessary implication.

Mich. Constitution, Art. IV., Section 38, 1 Howell, p. 48.
Detroit vs. Blackeby, 21 Mich., 84, 114.
Meriwether vs. Garrett, 102 U. S., 472, 511. (The Memphis case.)
Ottawa vs. Carey, 108 U. S., 110, 121. (A water bond case.)

The city being clothed with express power, and having exercised it, that exercise has been acted upon by the promoters of the company and the company itself, and the latter, under express power, has borrowed money upon its franchise and property from the complainant, who also acted upon the faith of the statute and city records. The city, by its own will, has become simply a consumer, and has *abdicated* its own power to supply, the same to be resumed, at its election, after 25 years, by purchase. The Supreme Court of Michigan decided in the Hanchett case, above, in the 42d Mich., that the whole right to be a corporation on the part of the company depended upon the prior voluntary abdication by the municipality of its charter power. Such abdication and self-deprivation of power is competent to be authorized by the State.

Gale vs. Kalamazoo, 23 Mich., 344.

It is too clear for argument that the action of the city in making the contract and passing resolutions was not *ultra vires*. But even if it were, that would not affect this case because, as we show below, the doctrine of *equitable estoppel* comes in and protects the right of the company and its mortgage creditor, the complainant, to the injunction prayed. A time contract for 25 years is lawful unless expressly forbidden.

Putnam vs. Grand Rapids, 58 Mich., 416; also cas. cit. *arg.* by Ransom.

VI.

Aside from all the considerations above mentioned, the bill in this cause places the right of the complainant to an injunction more especially upon the ground of *equitable estoppel.*

The city finding that it and its inhabitants were in need of a water supply, and that it had no adequate power under its charter by which it could provide the same, its common council passed said resolution of April 12 for the purpose of inviting parties to organize, provide the means and perform for the city and its inhabitants that needed service which it could not perform for itself and them.

The population of the city was not sufficient to sustain more than one system of water works (see Wiley's testimony, Rec., p. 137). And the city well knew that no company could afford or be induced to construct such works, and furnish the needed supply, unless it could have all the patronage that the town afforded. And by its said resolution and contract with the company, the city not only declared to the company that it had not sufficient power to provide such supply for itself, but it gave the company to understand and be assured that if it would construct the works and furnish the needed water supply, that the city would not undertake the performance of that service for itself and its inhabitants during the term of the contract.

And by means of such invitation and assurance this water company was induced to organize and invest its capital in these works. And it would be most inequitable so long as the company is ready and desirous of supplying the city in accordance with its agreement, for the council by means of taxes levied alike on the company's works as well as the other property in the city, to construct other works and

thereby deprive this company in whole or part of that patronage without which its capital invested and the security of those who have aided in the construction of the works must be injured or lost.

This doctrine of estoppel in such cases is set forth by the Supreme Court as follows: "The law upon the subject is well settled. The vital principal is that he who, by his language or conduct, leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both. This remedy is always so applied as to promote the ends of justice."

Dickerson vs. Colgrove, 100 U. S., 578, 580 (bottom).

A municipal corporation may thus be estopped, as well as a natural person.

6 Wait's Actions and Defenses, 685, cases cited.
County of Randolph vs. Post, 93 U. S., 508.
Athens vs. Georgia Railroad, 72 Ga., 150.
Atlanta vs. Gate City Gas Company, 71 Ga., 106.
Atlantic City Water Works vs. Atlantic City, 39 N. J. Eq., 367 (1883).

The latter case is so nearly in point that it justifies an extended statement.

The charter authorized the passage of ordinances for providing a supply of water, and another statute in the State provided for the organization of water companies and for their laying pipes in cities, with the consent of the municipal authorities.

The city of Atlanta gave its consent, by ordinance, upon condition of proper performance of the duty of supplying water by the company, on pain of forfeiture, after failure

for thirty days; and the company *accepted* this ordinance by an agreement executed both by the city and the company.

By a second and later ordinance, the city declared that it would not grant a like privilege to others.

The complianant filed its bill, alleging performance, the expenditure of $240,000, and stating that the city was about to grant authority to others to lay pipes, and asked a preliminary injunction, which was granted. The city moved to vacate upon the ground that the ordinance conferring exclusive privileges was *ultra vires*, created a monopoly, and was void.

The Court held that there was *no doubt* of the power of the city to make the contract with the company and that, although such power was not *expressly* conferred, it was NECESSARILY IMPLIED from the charter power of the city to pass ordinances providing for water supply.

That it was not necessary for the granting of a perpetual injunction to hold that the city had power to create a monopoly or to make an exclusive contract, because, it *was obvious* that, in order *to induce a company to invest the necessary capital, it must be secured against competition*, which *would diminish the value of its property*, and might *deprive it of all returns for its outlay*, and, indeed, *destroy* its enterprise, and, *irrespective of any exclusive feature in the contract*, the complainant was entitled, upon the ground of *estoppel*, to the protection prayed.

That the right of protection does not depend upon any contract on the part of the city that it should permit no one else to engage in the business.

That the Court would grant the injunction on the ground that the company had expended its investment *on the faith* that it should have the sole right.

That the franchise granted is exclusive by NECESSARY

IMPLICATION, arising from the purpose for which it is granted, which could not be accomplished otherwise.

The Court laid down the general proposition that equity will protect a corporation under such circumstances in the enjoyment of an exclusive privilege against competition, and cited among other cases,

Newburg Turnpike Company vs. Miller, 5 Johnson's Chancery, 101—CH. KENT.
Ogden vs. Gibbon, 4 Johnson's Chancery, 150.

The GEORGIA court also held that the defense of *misuser* could not be set up as a defense *collaterally*.

In another Georgia case, where the city had stood by and seen a gas company expend $140,000 in erecting buildings and making *preparations* for laying pipe, it was held that the city was *estopped* from refusing its consent to the laying of mains in the street.

Atlanta vs. Gate City Company, 71 Ga., 106.

The proofs establish in this case (see end of this brief) that the money furnished by the complainant company has been actually expended in the city of Grand Haven for its benefit, and that the city has received, accepted and used the water furnished by the company, and that the expenditure has been made by the company in good faith; and that it is, and has been, carrying out the purposes of its incorporation; and that the bondholders are *bona fide* holders, for value, who have advanced their money, in good faith, relying upon the statute and the action of the city authorized by it.

See also Foster vs. Joliet, 27 F. R., 904, near bottom.

VII.

The city's attempted rescission of the contract between it and the company was ineffectual.

The time originally fixed for the completion of the works was the first of July. The city extended the time to the first of September. On that day the works were nearly but not entirely finished.

But on the 4th of September, only four days after the time for their completion expired, this resolution of forfeiture was passed by the council. Solely for the reason that the works were not completed within the time agreed upon.

(See council proceeding of September 4, in par. 13 of defendant's answer, Record, p. 50.)

At the time of the passage of this resolution the company was actively engaged in their completion.

The city had suffered no loss or inconvenience from the non-completion of the works, nor had the council given the company any notice or warning that such forfeiture was intended, or would be enforced unless the work was completed by the day named. Nor was any notice of the resolution given to the company until after the 25th of September. (See council proceedings of September 25 and 27, in par. 13 of defendant's answer, Record, p. 50.) And in the meantime the works had been practically completed.

The contract did not express that time should be of the essence of it.

There was nothing in the nature of the undertaking that made its value depend upon its completion on the first of September. Time was not of the essence of the contract.

Dillon vs. Masterton, 39 N. Y., Sup. Ct., 133.
Steel vs. Branch, 40 Cal., 3.
St. Louis Heating Co. vs. Bissell, 41 Mo. App., 426.
Gram vs. Wasey, 45 Mich., 223.

And time not being of such essence, reasonable notice must be given of such intention to forfeit, or of a time within which the contract must be completed or a forfeiture will be declared.

Myer vs. De Mier, 52 N. Y., 647.
Carney vs. Newberry, 24 Ill., 203.
Peters vs. Canfield, 74 Mich., 498.

But if non-completion of the works were a sufficient cause for the attempted rescission in this case, still the city's allowing the work of construction to go on for three weeks after the passage of the resolution, and until they were practically completed, before giving notice of the resolution to the company, was an abandonment or waiver of it, and rendered it ineffectual.

VIII.

It is objected by defendant that the city, in agreeing to pay $4,200 a year water rents for 25 years, or during the term of said contract, assumed a liability aggregating $105,000, which exceeded the 2 per cent which the city was authorized to raise by tax on the assessed valuation of the city for such purposes during the year when the contract was made without a vote of the taxpayers, and that therefore the contract was void. And much reliance in support of this position was placed by defendant in the court below on the cases of *Putnam vs. Grand Rapids*, 58 Mich., 417, and *Niles Water Works vs. Niles*, 59 Mich., 311.

The provision of the city charter is as follows:

"SEC. 9. The common council shall have authority to "assess, levy and collect taxes. * * * *Provided*, They "shall not raise by general tax for city purposes more "than at the rate of two per centum upon the total assessed "valuation of the property in said city in any one year, "exclusive of school taxes and taxes for highway purposes,

"unless authorized thereto by a vote of the property-holding "taxpayers of said city."

It will be observed that this two per cent tax is for city purposes only and is over and above all taxes for State, county, school and highway purposes required to be raised in the city.

Defendant's proofs show (Record, pp. 365-6), that the assessed valuation of the city for the years 1883-4-5-6-7 was as follows:

For 1883	$1,970,880
For 1884	1,958,980
For 1885	1,836,058
For 1886	1,742,880
For 1887	1,676,345

And while two per cent on the assessed valuation of 1883, when the contract was made, would amount to $39,417, which, after paying the $4,200 water rental for that year, would leave $35,217 for other city expenses, it would not be sufficient for the payment of the aggregate water rental for 25 years.

But that fact would not invalidate the contract in this case, nor is any claim of invalidity on that ground supported by the ruling in *Putnam vs. Grand Rapids*, heretofore referred to. That case was decided on a peculiar provision in the city charter not found in the charter of Grand Haven. There a contract for lighting the city for five years, at $25,000 a year, was enjoined for the sole reason that the city charter expressly required that the city's contracts in any year must be paid by means raised the same year when made, if the payment thereof was not otherwise provided for. And the payment in that case not being otherwise provided for, the contract was prohibited, for the reason that the aggregate of the five years' payments of $25,000 each, amounting to $125,000, exceeded the sum which the city was authorized to raise by tax for such pur-

pose in the year when the contract was made. The section of the charter under which this decision was made is as follows:

"It shall not be lawful for the common council (except "as herein otherwise provided) to borrow money or author- "ize the creation of any liability or indebtedness against "said city in any one year exceeding in the aggregate the "amount which by this act may be raised by tax for such "year, and in case any sum or sums of money shall be bor- "rowed by said common council in any one year, or the "said common council or any officer thereof shall enter into "any contracts for the payment of money binding upon said "city, the same shall be paid out of the sums raised by tax "for such year, if the payment thereof is not otherwise pro- "vided." (See p. 422 of the case.)

And the Court said: "This section seems plainly "designed to express the idea that contracts not otherwise "provided for must contemplate fulfillment and payment "by means raised the same year, and *we place our decision* "*entirely on the restrictions of the charter, and not upon* "*any general incapacity had the charter been silent.* In "the face of the charter provisions, the array of author- "ities allowing time contracts by cities, which is certainly "very respectable, does not apply."

Putnam vs. Grand Rapids, 58 Mich., 413, 423.

In the case of the *Niles Water Works vs. The City of Niles*, 59 Mich, 311, where the city charter had a provision enacted in 1887, providing that the common council should have no power "*to contract debts, incur liabilities or make* "*expenditures in any one year which shall exceed the* "*revenues for the same year unless first authorized to do so* "*by a majority vote of the taxpayers of said city*," etc., it was held that a contract by the city without such vote for a water supply for thirty years at $2,500 a year, created a lia-

bility to the extent of the whole aggregate amount ($75,000), which exceeded the amount which the city was authorized to raise by tax for such purpose in the year when the contract was made, was invalid.

And this ruling was made solely on account of the charter provision above quoted, which was enacted in 1887 and subsequent to the enactment of Sec. 3127, Chap. 84 of How. Stat., and therefore created a new restriction in that city, which superseded the operation of said chap. 84 in said city.

See the case 59 Mich., 311.

But there is no such provisions or restriction as those in the above cases to be found in the said chap. 84, or in the Grand Haven charter, nor any provision in any way limiting the liability which that city may incur in any year, to the amount of taxes that may be levied for its payment in he same year.

Nor would the inability to expend any money in any one year, in excess of the amount that the city could raise by tax in that year, make it unlawful to incur liabilities requiring payments in future years.

Weston vs. Syracuse, 17 N. Y., 110.

Nor is a contract, extending over a series of years, providing for payments to be made by future taxation, invalid as interfering with or a surrender of the legislative power of the city.

Gale vs. Kalamazoo, 23 Mich., 344, 351.
Valparaiso vs. Gardner, 97 Ind., 1.
N. O. Gas Light Co. vs. New Orleans, 42 La. An. Rep.
Atlantic, etc., Co. vs. Atlantic City, 48 N. Y., Law 378.

Nor is the objection that this contract between the city and the Grand Haven Water Works is prohibited by section 34 of the city charter, unless approved by a vote of the taxpayers a valid one.

That section is as follows :

"SEC. 34. No bond or note, or other obligation, or evi-
"dence of indebtedness of said corporation, except as pro-
"vided in sections eighty and eighty-one of this act, or by
"any officer thereof, in his official capacity, whereby the
"said city shall become obligated to pay any sum of money,
"but the common council may indorse on all accounts
"which may be presented against said city the amount
"allowed by them thereon."

Said sections 80 and 81 provides as follows :

"SEC. 80. Whenever the common council shall deem it
"necessary to issue bonds of the city for any purpose, they
"shall call a meeting of the property holding taxpayers of
"the city, being electors thereof, by posting notices in five
"of the most conspicuous places in said city, at least ten days
"previous to the time of such meeting, also specifying the
"amount and object for which it is proposed to issue said
"bonds; the mayor, or in his absence, the recorder, shall
"preside at such meeting; said election shall be conducted
"in the same manner and the canvass of votes, as near as
"may be, as other elections under this act. At the close of
"such election, the inspectors shall make two certificates of
"the number of votes given for and against such issue of
"bonds, one of which shall be forthwith deposited with the
"recorder of said city, and the other filed in the office of
"the county clerk for the county of Ottawa: *Provided*,
"that not more than two of such meetings shall be called in
"any one year.

"SEC. 81. Whenever the common council shall be author-
"ized by vote of the taxpayers as aforesaid, they may issue
"the bonds of said city for the amount aforesaid, and pro-
"vide for the payment of the interest thereon; and for this
"purpose shall annually levy, assess and collect on the afore-
"said value of all the real and personal estate in said city,
"made taxable by the laws of this State, taxes for the pur-

"pose, not to exceed in amount a sufficient sum to pay the "interest accrued or to accrue on said bonds and for the year "for which said taxes are levied."

The city's contract for a water supply in this case is not a bond or note. It is not an evidence of indebtedness within the meaning of said section 34.

Nothing is a debt that depends on future accruing. A contract for a water supply to be furnished in the future, and to be paid for when furnished, is held not to create a debt, and is not the evidence of an indebtedness.

Diveley vs. Cedar Falls, 27 Iowa, 227.
Valparaiso vs. Gardner, 97 Ind., 1.
Smith vs. Dedham, 144 Mass., 177.
Utica Water Works vs. Utica, 31 Hun., 426.
City Water Co. vs. Montgomery, 9 Sou. Rep., 348.
East St. Louis vs. East St. Louis, Etc., Co., 96 Ill., 415.
N. Y. Mut. Gas Co. vs. N. Y. City, 49 N. Y., 247.
Burlington Water Co. vs. Woodward, 49 Ia., 58.
Crowder vs. Sullivan, 28 Ne. Rep. (Ind.), 94

A sum payable on a contingency is not a debt, and does not become so until the contingency happens.

People vs. Arguello, 37 Cal., 524.

It is submitted that the city's agreement in said contract to pay $4,200 a year for a water supply is not such an *obligation* as is prohibited by said section 34, unless authorized by a vote of the people.

The contract in this case relates to the ordinary expenditures of the city.

Grant vs. Davenport, 36 Iowa, 227.
East St. Louis vs. East St. L. Co., 98 Ill., 415.

The charter confers upon the council and city officers numerous powers for the conduct of the city government, and the protection and improvement of the public property, and the providing of supplies, all of which must be accomplished by contract in some form, of almost daily occurrence, and the incurring of corresponding obligations of payments in greater or smaller amounts. And if this contract for a water supply, to be paid for in the future, is prohibited unless authorized by vote of the taxpayers, then every other obligation of the city for the payment of money, no matter what the necessity or the amount, is equally prohibited unless so authorized. Compliance with this section in conducting city affairs, if such were its intent, would be intolerable.

Construing this section 34 with the other provisions of the charter, authorizing the incurring of obligations, and with said sections 80 and 81, which provide for a vote on the issue of bonds only, and limit such votes to two in a year, it becomes plain that it was the purpose of these sections to provide merely for the submission of the question of the loaning of money and the issuing of bonds therefor, or for such other indebtedness as it is intended to secure by city bonds, to a vote of the taxpayers.

These sections were plainly intended to regulate the issue of city bonds only, and not the contracting for the ordinary and necessary expenditures of the city.

But even if said section 34 was intended to require such a contract as the one in question to be submitted to vote, still the contract between the city and company in this case requires no such sanction.

It was made under and by authority of said Section 3121 of said chapter 84, which is a later enactment than any of the provisions of the Grand Haven charter.

Said chapter 84 is a general law, applying alike to all the

cities and villages of the State, and conferring upon all such as desire to avail themselves of it, new and ample powers, in addition to and independent of their charter powers, to provide for the construction of water works, and to contract for a supply, and to make binding agreements to pay for the same, and for the time and mode of payment, without reference to any provisions or restrictions in the charter or vote of the taxpayers.

Any restriction in the charter which is inconsistent with the act of 1873 (said chapter 84), is repealed by implication, or superseded or suspended by it, because the "*later statute clearly intends to prescribe the only rule which should govern.*"

Davies vs. Fairborn, 3 How., 636–645.

That it was the intent of said chapter that the common councils of cities and villages acting under it should have the power solely at their discretion to provide a water supply, and bind the municipality to pay for it without the vote of taxpayers, is plain not only from said section 3121 but from said chapter as a whole. Sec. 17 (3126) provides that any city or village may subscribe to the stock of any such company organized to supply it with water if authorized to do so by vote of its electors—but the authority in section 3121 to contract for a water supply is coupled with no such requirement.

As sustaining complainants' claim that said chapter 84 conferred upon the council a new power superseding and independent of any charter restriction, if any there are, to contract for a water supply and to pay for it (see *Dutton vs. Aurora*, 114 Ill., 138). In that case it appeared that the charter of Aurora prohibited the city from borrowing more than $5,000, and from levying taxes exceeding one and one-half per cent for general purposes in any one year.

Subsequently a general law of the State authorized cities and incorporated towns to provide for a water supply and to

borrow money and levy and collect taxes in the same manner as other taxes for the construction of such works. Held that the general law left the municipal authorities unrestricted by their charters as to the character and cost of the means of such supply, and authorized them to borrow money for that purpose to the extent that should be necessary in order to make the contemplated improvements. And that the general law operated as a repeal of the provisions in the charter in so far as they limited the amount that might be borrowed for such purpose or taxes levied for repayment.

And the same doctrine is held

Culbertson vs. City of Fulton, 18 N. E. R., 781.

Haynes vs. Cape May, 19 N. E. R., 178; 52 N. J. Law, 180.

State vs. City of Bayonne, 22 Atl. Rep., 1006.

But the limitations of the city charter of 1867 as to a vote of the taxpayers applies only to the general provisions pointed out in the charter itself, and not to the *special purpose* provided for in the Water Works Act of 1869, chapter 84.

Thus, where there was a provision in a city charter that the council should not borrow for general purposes more than $50,000, it was held by the Supreme Court of the United States that the provision did not limit the debt of the city, nor prohibit the council from entering into a contract involving an expenditure exceeding that amount for *special improvements*, such as grading and paving streets, and laying sidewalks, improvements which are authorized by the charter.

Hitchcock vs. Galveston, 96 U. S., 341.

IX.

INJURY TO COMPLAINANT'S SECURITY.

At the time of commencing to supply water from its new or extended works, the city fixed a scale of charges for water to private consumers (Record, p. 307) at rates below the cost of supplying the water (see Wiley's testimony, Record, p. 141). And by this means the city, at the time of filing the bill (see Cosgrove's testimony, Record, pp. 84–5–6), had drawn away a large number of the patrons of the Grand Haven Water Works, so as to reduce its yearly income more than $1,000 a year, and to very materially depreciate the value of the works, which course on the part of the city would practically destroy their value if continued.

The competency of this complainant to file this bill is unquestionable.

R. R. Commission Cases, 116 U. S., 307.
Farmers L. & T. Co. vs. Stone, 20 Fed. Rep., 171.

The former case was an appeal from the latter. A bill was filed by a mortgagee of a railroad to restrain third parties, railroad commissioners of a State, from interfering with rates chargeable by the mortgagor railroad, so as to diminish the power of the mortgagor to pay the mortgagee complainant. In both courts the right to maintain the bill passed without objection.

The defendants here say that there is no *privity* between the complainant and the defendant. The answer is, that the right of the complainant to maintain the bill springs from tort and not from contract, and rests upon the maxims

that every one must use his own so as not to injure another, and that every one is presumed to intend the consequences of his acts.

"Trespass is destruction where there is *no privity* of estate."

Marshall, C J., 9 Wheat., 842.

A mortgagee may maintain an action at law for injury to his security.

Van Pelt vs. McGraw, 4 Comst., N. Y., 110.

Cited and followed by the late Judge Withey in

Morgan vs. Gilbert, 2 Fed. Rep., 835.

Irresponsibility of the mortgagor need not be alleged.

Turrell vs. Jackson, 39 N. J. Law, 329.
Worthington vs. Hanna, 23 Mich., 530.

The right to file a bill to restrain an injury threatened to a mortgage security is the correlative of the right to recover damages at law for an injury to it.

3 Pomeroy Eq., Secs. 1339, 1345, 1348.

The defendant city says it intends to and shall continue the construction and operation of its works.

See defendant's answer.

In a famous case, the Supreme Court held that equity would restrain a State officer from acting under a void law of the State so as to *injure a franchise* of the complainant by taxing its business of a bank.

Osborn vs. Bank, 9 Wheat., 738, 741.

The Water Company itself might file the bill. The mortgagee is the mortgagee of the franchise, as well as of the income and the plant and the land. Such a mortgage is authorized in Michigan.

Section 4885, 1 Howell's Statutes.

This law recognizes the validity of such mortages by any corporation, and provides a mode of transmitting the franchise to be a corporation to the purchaser on foreclosure, and that the franchise and property used with it may be sold as an entirety.

Under this act the mortgage of the franchise of the Lake Superior Ship Canal was foreclosed by decree of the Supreme Court, U. S., and that franchise is now exercised by the purchaser, although the statute under which the company existed did not authorize the mortgage of the franchise, or even give power to make a mortgage, but only to issue bonds.

Canal Act, 1 How. Stat., Chap. 110.
Jerome vs. McCarter, 94 U. S., 734.

The Supreme Court of Michigan declares distinctly and unequivocally that Michigan corporations may mortgage their franchises, and such a mortgage was sustained, although the Gas Company Act under which the mortgagor company was formed contained no authority to mortgage the franchises.

Gas Act, 1 How. Stat., Chap. 126.
Detroit vs. Mutual Gas Co., 43 Mich., 594, 601, 603.

Positive legislative authority is requisite.

Memphis R. R. Co. vs. Commissioners, 112 U. S., 609, 613, 620.

The Michigan statute above cited, pointing out a mode of rendering effectual a sale and transfer of mortgaged franchises, is such "*positive legislation*" as the U. S. Supreme Court refers to.

The Court will take judicial notice that the alienation of property to secure bondholders, by universal custom includes the franchises connected with the property.

Brown vs. Piper, 91 U. S., 37.

There is a distinction between the franchise to be a corporation, which is the property of the corporators, and the right to maintain and operate the plant.

Joy vs. Jackson Plank Road, 11 Mich., 164.
2 Morawetz Corp., 2 Ed., Sec. 932.
Clifford, J., Sweatt vs. Boston H. & E. R. R., 5 B. R., 251.
Dillon J., U. P. R. R. vs. Lincoln County, 10 A. L. Reg., N. S., 464.

And it is everywhere conceded that the franchise of carrying on business, and taking tolls, may pass under mortgage, even though the franchise to exercise corporate power may not.

X.

WATER WORKS COMPANY'S CONTRACT PERFORMED—EVIDENCE.

The evidence in this case shows a substantial performance by the Grand Haven Water Works (corporation) of its agreements with the city for the construction of water works and the supply of the city and its inhabitants with water therefrom.

The contract between the water works company and the city (Exhibit 1 to complainant's testimony) is set forth as Schedule B to the bill (Record, p. 15), and is also copied in full, commencing on page 119 of the printed record.

ORGANIZATION.

The due organization of the company, as required by the contract, is not questioned. A copy of its articles of incorporation is in proof (see Record, p. 290).

PLAN OF THE WORKS.

The testimony of Mr. Angell, the city recorder, shows (Record, p. 124) that a map and plan for the construction of the works and laying water pipes was filed with the city council, as required by the agreement.

TIME OF COMPLETION.

The contract provided for the completion of the works on or before July 1, 1884; but the city council extended the time to September 1, 1884. (See answer, Record, p. 50, par. 13.) They were completed about the 1st of October, 1884. The witness Van Patten, who was engaged on the works at the time, says (Record, p. 164, fol. 270) that they were opened for business to deliver water and begun running the latter part of September or the fore part of October, 1884 (Record, p. 154). Wiley says they were completed in October (Record, p. 149). At most, it was only a little more than a month after the time when they should have been completed.

PIPES AND MAINS.

The testimony of Wiley (Record, pp. 127) and of Cosgrove (p. 186) shows that in the construction of the works the requisite amount and quality of cast and wrought iron mains and water pipes, required by the contract (Record, p. 16), has been laid in the streets. And testimony taken on commission at the place of manufacture shows (Record, pp. 95 to 109), all of this pipe to be of the required standard weight and pressure test.

HYDRANTS.

It is also shown by the complainant's proofs (Record, p. 133) that the required number of 60 double hydrants of the best quality were set upon the pipes and mains at points

(pp. 132–3, 150) designated by the city council, and (p. 109) that all of them were of the required pressure test of 300 pounds to the square inch.

None of the above matters are controverted by the evidence.

PUMP HOUSE.

It is shown by complainant's proofs and not controverted, that the location, construction and material of the pump house or pumping station is in conformity with said agreement.

PUMPS AND MACHINERY.

It is also shown by complainant's witnesses, Wiley, Cosgrove and Van Patten, and not controverted by any evidence, that the pumping machinery, pumps, steam engine and boilers of the works are of the character, power, capacity and construction required by said contract, and that the general construction of the plant and works is also in conformity therewith.

PRESSURE POWER.

Mr. Wiley, who constructed these works, and who is shown (Record, p. 125) to be a hydraulic engineer of long standing and of great experience, and to have constructed and operated many systems of water works, says (Record, p. 128): That these pumps are capable of throwing six or eight one-inch streams of water simultaneously, 100 feet high. And upon cross-examination (p. 151) he says: The pumps and boilers have the capacity to fill the contract to throw six streams 100 feet high. And the defense has not introduced any evidence negativing this testimony.

It is true that at a test of these works, made before the members of the city council in January, 1885, they failed to throw six streams simultaneously to the required

height of 100 feet. But the failure is shown to have occurred from accidental causes, and not from any want of power or capacity of the works. The test (Record, p. 155) was at an unfavorable time on a very cold and windy day. The works were then new and had been in operation but little over two months; and (Record, p. 156) had never before been subjected to the strain of throwing so much water; and early in the test (Record, p. 155–176) an extensive leak, three inches long and half an inch wide (equal to one and one-half one-inch streams), was caused by the bursting of a joint in one of the street pipes, and one of the pumps was accidentally disabled by the clogging of its valves, with chips and sticks, so that from these two causes about one-half of the efficiency of the works was lost. And Mr. Van Patten says (Record, p. 156) that had it not been for these causes the six streams would have been thrown 100 feet high at that test. Still, with all these disabilities, the six streams were thrown to the height of about 80 feet. (Record, p. 156.)

These causes of failure were immediately discovered and repaired, and reported to the council, and another test was requested by the company (see Rec., p. 176, and Council Proceedings, p. 54, and Complainant's Exhibit No. 7), which request was declined by that body, on the ground that the weather was too cold (Record, p. 54, fol. 90.)

Under such circumstances it does not lie with the city to say that the water works are lacking in power or efficiency. And, in fact, the city has not introduced any testimony (except of said failure at the test) to show that the works are, in any respect, lacking in power or efficiency.

The council did, however, within a few days after said test, spread upon its records certain specifications (see Record, p. 53, fol. 89) of alleged non-compliance by the company with said contract. But the city has not offered any evidence showing such non-compliance.

On the contrary, the uncontroverted testimony of complainant's witnesses, Van Patten (Record, pp. 157–8–9) and Cosgrove (Record, pp. 181–2–3–4–5), shows that from the middle of January, 1885, to the 12th of April, 1888, a period of more than three years, the company furnished to the city, for its fire department, all the water required by it, and for the extinguishment of very numerous fires—more than 50 in all—and that during all that time there was no lack or failure or any complaint, nor is there now any evidence of any lack or failure on the part of the company in supplying all the water needed, and with all the pressure, power and promptness desired. And the defendant's witness, Joseph Palmer, the chief of the city fire department, and who, as chief and assistant chief, has been connected with the department ever since the works were started, says (Record, p. 258): We (the fire department) used the water from these works at every fire almost up to the year 1888, and (p. 258) we always found them (the water works) ready to furnish water, and he mentions no instance where the water supplied was lacking in quantity, force or pressure at any fire or on any occasion, nor any complaint of any such thing.

WATER—SOURCE OF SUPPLY—WELLS.

The stipulations of the contract (see Record, pp. 16–17), as to these matters, have been substantially performed.

The location of the pumping station and source of water supply is at the head of Washington street, above the city and near the Grand River, and at a place free from the contamination of city sewerage (see complainant's proofs, Record, pp. 129).

Of this locality Mr. Wiley, who constructed the works, says (Record, p. 129): That it was selected, after careful examination, by driving wells in different parts of the city, for several weeks; that the place affords an ample water

supply, in a heavy stratum of gravel always full of water; and that it is the best source of water supply for fire, mechanical, domestic and manufacturing purposes there is at the city of Grand Haven. And (p. 129) very hard to exhaust.

The water supplied is from driven wells, sunk in this locality near the pump house (Wiley, test., p. 129, 130; Cosgrove, p. 180).

A pipe line was also run from the pump house to the river for temporary use, if needed, in case of an extensive conflagration, or in case of a breakdown or accident to the other lines or sources of supply (Wiley, Record, p. 132; Cosgrove, 187).

The number of driven wells put down at first was 45 or 50 (Record, p. 129); afterwards more were added (pp. 131, 160). There are now 92 in all, 18 of which have been added since September, 1885 (Cosgrove's test., p. 180).

These wells are constructed with brass wirecloth, through which the water passes (Wiley, p. 131). Hence no other filters or infiltration galleries are needed (Cosgrove's test., p.).

WATER REQUIRED—AMOUNT FURNISHED.

The bill states and the answer admits that the population of the city is about, but does not exceed 6,000.

Mr. Wiley testifies (pp. 132 and) that experience and the statistics show that the average amount of water per diem required for fire, domestic and all purposes in non-manufacturing towns is 30 gallons, and in manufacturing towns 49 gallons, per head of the adult population.

WELL WATER FURNISHED.

When the works commenced running in the fall of 1884 with 45 or 50 wells, Wiley says (Rec., p. 130), that they would yield 300,000 gallons per day.

In the spring of 1885 about 40 additional wells were put down (Rec., p. 160, 176); and a test made in October of that year showed a yield of 4,000 gallons per day (Cosgrove's testimony, Rec., pp. 180, 195) and after that test 18 additional wells were put down (Cosgrove's testimony, Rec., pp. 180), making 92 in all. From all of this it plainly appears that the water supply from the wells during the years 1885–6–7 down to the filing of the bill in this cause could never have been less than 350,000 gallons per day. And the highest number of consumers or parties receiving their water supply from these works at any one time was 200 (Cosgrove's testimony, Rec., pp. 180).

Dividing up this daily yield of 350,000 gallons among the families of these 200 consumers would give to each family 1,750 gallons of water per day. And allowing six members to each family would give 291 gallons per day to each or 54 gallons per day to each of the 6,000 population in the city.

WATER SUPPLY SUFFICIENT.

Here then was an ample supply of water from wells for all the requirements of the city and its inhabitants. And yet, while the wells could produce 350,000 gallons per day, Mr. Cosgrove says that during the three years of his superintendency, from October, 1888, the average daily amount of water called for and required for domestic, fire and all other purposes in the city was only 250,000 gallons (Cosgrove's testimony, pp. 186).

So that it is quite evident that the supply from these wells is ample for all ordinary requirements of fire, domestic and other purposes.

Still, on a few occasion, when great quantities of water have been required, resort has been had to the river for the additional supply.

At the test of the works, had before the city aldermen,

January 15, 1885, a large quantity of water was required, and a part of it was drawn from the river—and twice at fires and once in case of an accident to the works under Mr. Van Patten's superintendency in 1885, a part of the water required was drawn from the same source (see Record, pp. 160, 161), and since then water from the river has been used a half dozen times at fires under Mr. Cosgrove's superintendency, and twice for a few hours on account of accidents to or repair of the works. (Cosgrove's testimony, pp. 157, 158, 201.)

But defendants' witness Douglass, who was engaged at the works under Van Patten, and for a short under Cosgrove's superintendency, says (Record, p. 237) that for the first three or four months after starting the works, the water used was from the driven wells—that after that, water was occasionally taken from the river to make up deficiencies, a small amount at first, but as the weather got hotter, more was taken, *perhaps* a third during July and a part of August. And (p. 237) at fires, the first year, when pumping more than 20 minutes, water was taken from the river; and (p. 238) the second year we had a reservoir, and that year water for fires was taken from the river *or* the reservoir—and he says that Van Patten and Cosgrove knew when the water was drawn from the river. But he does not state the number of fires in either year when water from the river was so used, and, therefore, does not contradict either of those witnesses as to the number of times when river water was so used. And if he intended to say that water was drawn from the river while he was at the works, for domestic use, or on any other occasions than those mentioned by Van Patten and Cosgrove, then he is at variance with both of those superintendents, and must be mistaken, and his recollection cannot be reliable. For Mr. Van Patten testifies (Record, p. 159) that in delivering water for domestic service, and pumping

right along from day to day during his superintendency, the water was drawn from the driven wells; and (Record, pp. 160, 161, 172) that twice at fires and once on account of an accident to the works, a part of the water was taken from the river. And Mr. Cosgrove's testimony shows (Record, p. 180) that during the three years of his superintendency the water supply of said works was obtained from drive wells and a dug well, except (pp. 186, 187) that upon the occasion of half a dozen of the largest fires in the city within that time a part of the water for their extinguishment was drawn from the river, and also on two other occasions, when repairing or adding to the pipe lines, water was drawn from the river for a few hours only.

QUALITY OF THE WATER.

The water supplied is good and wholesome.

As already stated, Mr. Wiley testifies that the location and source of supply is the best there is in or around the city, and is not contaminated by city sewerage. And this testimony is not controverted by any witness.

It may be that upon some occasions, or in some localities in the city, the water has not always been in as good condition as desirable.

Some of the witnesses on both sides claim that during a severe drought in the latter part of the summer of 1887, an inordinate amount of water was drawn from the works for lawn sprinkling and other purposes, and that for a short time during that period the water was not good. And that occasionally for a few hours after a fire the water (in some parts of the city) would have a reddish color or appear roily, and would not be as good as usual. But this was accounted for by complainant's witnesses by showing that some of the water pipes (Rec., pp. 190, 191) passed through and into streets where but little if any water was ordinarily used, and Mr. Wiley testified (Record, p. 189, 190) that

in all cases where fresh water, whether spring water or not, is confined in iron pipes, and the flow is not sufficient to change it frequently, it will soon begin to decompose and will throw down a reddish sediment; and that in all water works where water rests quietly or with but little motion, as in parts of the system where there are but few consumers and but little water is used, this sediment will occur and will show itself and discolor the water for a few hours, when the system, or some part of it comes to be stirred up by the rush of water for the extinguishment of fires. And it may be that on some of those occasions when water has been taken from the river on account of fires or the accidents spoken of by the witnesses Van Patten and Cosgrove, the water in some parts of the system may have been left for a short time in not so good a condition as usual.

But if the conditions or roilyness of the water after fires were attributable to the use of river water, still, it is not shown by any witness that the river water is deleterious to health.

In regard to the quality of the water, as shown by the defense,

ON THE PART OF THE DEFENSE.

The first witness, Douglass, testifies that he was employed at the works two years, from September or October, 1884, to September, 1886. And (Record, p. 271–2) that he and his family lived at the pump house all that time, and used the water from these wells for drinking, cooking and everything. That he had no fault to find with the water; that it was good water.

Henry Blocker (p. 253–4) says that he has used the water since 1885 at his machine shop at the end of Fulton street, but never for household purposes. That he and his men drink it at the shop in cold weather, but not in the summer. That it smells then, and would make a man sick to drink it. That he first noticed this in warm weather in 1886.

And the defendant's witness, Dr. Walkley, is the only other person who has said that the water is deleterious to health. He says (Record, p. 247) that he has used it three years, commencing in June, 1886. That it was bad then, and (p. 247) was bad all that summer until December, and is poor water now (1888), and that one morning he found a fish in it. But defendant's witness, Henry Baar, who is a pharmacist and druggist, and used the water during that same time, and for nearly four years after the works started, says (p. 284) that up to June 20, 1887, the water was first-class. And the doctor (p. 247) attributed the quality of the water not to impurities in the source of supply, but to the pipes not being flushed out, or, in other words, to its remaining too quietly in the pipes.

But he can have little faith in his own opinion that the water is deleterious to health; says (p. 248) that he never tested it, but (p. 248) has continued to use it in his family ever since for drinking, cooking and all purposes; and (p. 249) that the health of his family is better now than it was the first summer they used the water. Nor does he say that the water ever caused sickness in his own or any other family.

Defendant's witness Cass (pp. 279, 280) says he has used the water for drinking and cooking about four years. Thinks the water is not good; that at times it has not been really fit for use; sometimes it smelled bad. At other times it was quite passable. Several times after fires it was roily—almost muddy, and then (p. 251) would take about half a day to get clear again. But the fires at which this occurred were not frequent.

Joseph Palmer says (p. 256) that at fires the water was roily, dirty, muddy; don't know how it was at other times.

Chas. E. Wyman (pp. 261) says: Part of the time the water was very bad; at fires it was red and muddy for

perhaps 24 hours, and then it would be pretty fair. Once found something alive in it—three-fourths of an inch long. And (p. 262) used the water two or three years for cooking, drinking and all purposes, but a great deal of the time at fires it was not fit for use, say for 24 hours, and then it would be all clear again.

Henry D. Irish, for defendant (p. 281), says he used the water two or three years, commencing soon after the works started. That (p. 281–2) he could not ask for better water than it was then, and that it continued so up to a year ago last summer (summer of 1887), until (p. 282–3) the latter part of July or first of August. Then (p. 282) it began to taste of river water, and (p. 282) he stopped using it for drinking, but used it for all other purposes. The water (p. 282) was worse at times after a fire, but as soon as the pipes were emptied the water came up fresh, and would be all right.

And Henry Baar, pharmacist, testifying for defendant, says (p. 284–5) that he used the water from these works for three or four years in his drug store. That up to June 20, 1887, it was first-class. But after that it was not very good.

And this is the scope and range of defendant's testimony as to the quality of the water from these works. Out of nearly three hundred private consumers who have patronized the works within the last four years the city has found but two persons, Blocker and Walkley, who speak of the water as deleterious to health. While its witness Douglass says that for the two years, 1885 and 1886, that he was employed at the works the water was good. Irish says that up to July, 1887, he could not ask for better water. And Henry Baar says that up to June 20, 1887, the water was first-class. And the testimony of the witnesses, Palmer, Wyman, Irish and Baar indicate that the fault they have found with the water is not from deleterious qualities but rather from the roiliness and discoloration caused by the use of water at fires

and during the drouth of 1887. And Cass says as already shown that the fires at which this occurred were not frequent.

On the part of the complainant, the witness Wiley says (Record p. 128–9) the location of the water supply and the water is free from the contamination of sewerage. That after repeated trials and examinations we found the water pure. And (p. 131–2) the quality of the water from the wells is excellent and not deleterious to the health of those who use it; and (p. 134–5) I have never heard that it was. I know there is nothing in it deleterious to health.

And on cross-examination (pp. 213, 214) he says: I consider water taken from Grand River at the pump house to be for two-thirds of the year superior to well water for domestic use.

George Van Patten says (p. 161) the water delivered to consumers during the whole time I was superintendent (from the fall of 1884 to September, 1885) was not deleterious to health. It was good water. That is what everybody said.

Mr. Cosgrove, who has been superintendent of the works since September, 1885, says (pp. 180, 181): The water furnished from the wells while he has been superintendent was good, pure water, not deleterious to health. That (p. 188) using river water when it has been so used has not made the water furnished deleterious to the public health. And on cross-examination (p. 200) he says: I know that the water furnished since I have been superintendent is not deleterious to health, because I have used it right along in my own family.

He says (pp. 190, 191, 203) the works have pipes in some streets where there are no consumers, and some in streets where there are very few, and that water standing for a time in such pipes and in dead ends, where it cannot get out unless a hydrant is opened, will become discolored, dark and red, and taste of the pipes, and throw down sediment;

but that there is nothing unhealthy about it for this cause; and (pp. 200, 201) that this reddish water will show itself princially when hydrants are opened to draw it off, or at fires, where it may be moved along so that some of it may reach water takers; and (pp. 200–1) that he has heard complaints, perhaps a half a dozen times, about the water being poor, but not more than that.

Levi Schofield, formerly mayor of the city, says (pp. 216, 217) that since 1884 he has used the water from these works for every household use; that after a fire of any considerable duration, when the hydrants were used for some time, the water would have the appearance of river water, which would pass off in a few hours; that, with that exception, he had no fault to find with the water; that the water was never a cause of sickness, to his knowledge; that sickness was never attributed to it in his family.

George W. Stickney, cashier of the First National Bank of the city, says (pp. 222–3) that he is a taker of the water. Has seen it in use about town, and has been interested in watching and experimenting with it somewhat. That with the exception of last summer (1887), during the extreme drouth, when every city about us was without water, it has been good, bright and clear; always better than in average towns about. With the exception of this extreme drought last summer, the water, so far as his observation goes, was always good.

Jacob Baar says (p. 270) that he has used the water from these works for the last three and a half years and (p. 265) for the last two and a half years, at his present residence, for culinary and household purposes, and (p. 265) that it is entirely satisfactory and all right and healthful, and that he should not use it if he did not consider it so. And on cross-examination (pp. 270–1), says that all the time he has used the water it has been entirely satisfactory to him—

good, pure, clean water—except on one occasion for about ten days in August, 1887, during the drought, when the water was not good. At all other times, and always after fires, it was good, pure, clear water.

SHERMAN H. BOYCE testifies (pp. 286–7) that he has used the water in his family for cooking, drinking and all family uses since February 2, 1887. That with one or two short exceptions, short intervals, the water has been very nice, perfectly clear in appearance, and perfectly satisfactory to taste. That the exceptions spoken of were, that on not more than three occasions, not more than three or four times, and never lasting longer than from one to three hours, the water appeared dark and roily, caused, as he understood, by the excessive use of water at fires, but that he never discovered anything unhealthy or deleterious to health in the water.

DERK BAKKER testifies (p. 288) that for over two years he has used and is still using the water from these water works for cooking, drinking and all household purposes. That he has found it all right, good water, only after a fire it was dark for a little while, for three or four hours maybe, and then it would be good again, and that he has never found anything unhealthy about it.

Here then are eight witnesses on the part of the complainant who testify to the wholesomeness of the water, and that it is not deleterious to the health of those using it. While of defendant's witnesses, Douglass testifies to the healthfulness of the water during the whole two years that he used it, and two others, Irish and Henry Baar, say that it was first-class and good as could be wished up to the summer of 1877, and none of them say it is deleterious to health except two, Walkley and Blocker.

And out of all the 265 private consumers (see Rec., p. 289) who had used this water for domestic purposes in their families for three years, from the starting up of the works

until the filing of the bill in this suit, and of all the hundreds of children using this water for the same time in the public schools, no one has been found to speak of the water as deleterious to health except these two persons, Dr. Walkley and Blocker; and the latter merely gives it as his opinion, that in the summer the water would make the men sick at his shop, but says that they drink it in cold weather, and he mentions no case in which the health of any person has been affected by it. Nor does Dr. Walkley mention any instance in all his practice in the city, where he has observed or known of any injurious effects attributable to the use of this water outside of his own family. No one speaks of the water from the wells as being otherwise than good and wholesome, and as previously shown the wells in use when the works started yielded 300,000 gallons per day; equal to 1,130 gallons per day to each family supplied, and 50 gallons per day to each person in the city. Even the committee in their report to the Council of the results of the test of January 15 speak of the well water as good and wholesome (Record, p. 53); that is, when in that report they say that "*the supply of good and sufficient* "*water for fire, etc., and domestic purposes, and not dele-* "*terious to the health of those using it, became exhausted* "*within twenty minutes from the time the test began*," they refer to the water from these wells, for defendant's witness Douglass, the engineer, says (Record, p. 240) that at the test they first pumped for about twenty minutes from the wells, and then connected with the river.

And after this test, the supply of well water was increased by the addition of about forty drive wells in the spring and summer following, so that at the test in October of that year, the supply of water from this source was 400,000 gallons per day (Record, pp. 180, 195), which was subsequently further increased by eighteen more wells put down by Cosgrove, making ninety-two drive wells in all (Record, p. 180),

which gave an ample supply for the city, and shows, as indicated by the testimony, that whatever cause of complaint there has been in regard to the water was temporary, and attributable to some effect of drought or hot weather, or some cause arising from the fixtures or premises where the water was delivered, and not from the quality of the well water itself, nor from the use of river water, for Van Patten says that river water was used only three times during his superintendency (see Record, p. 161), and from that time to filing of the bill it was used twice in cases of accident to the pipes, and half a dozen times at the larger fires in the city (see Cosgrove's test., Rec., p. 187).

The preponderance of the evidence is that the water is wholesome and substantially in compliance with the requirements of the contract.

WATER RATES.

The water rates charged by the company to private consumers are in accordance with the contract (Record, p. 19). A table of these rates is given in complainant's Exhibit "No. 6" (p. 213). And Mr. Wiley testifies (p. 137) that they are below the average rates charged by companies in other cities under like circumstances and conditions, and there is no testimony on the part of the defense controverting this or attempting to show that such rates are unreasonable.

POWER AND CAPACITY OF THE COMPANY'S WORKS.

The company's works are of ample power and capacity to supply all the water needed in the city for any purpose from water works (Cosgrove, p. 185–6). And the supply of water from them has always been and is ample for all purposes (Van Patten, p. 161; Cosgrove, p. 185).

The company is supplying water to the public schools of the city (Record, p. 180), as required by its agreement;

and for three years and upwards it has furnished to the inhabitants of the city and to the city, and to its fire department, all the water needed and required of it, with all the promptness, pressure power and efficiency desired (see complainant's proofs, pp. 159, 160, 161, 185 and 85).

And no evidence has been offered to show any lack or failure of the company or of its works in any of these respects, nor of any complaint of any such failure.

And ever since the works commenced running the company has been at all times, and is ready, able and desirous to supply the city and its inhabitants with all the water needed for fire, domestic and other purposes required from the works, and has so supplied all that has been called for (Cosgrove's test., pp. 85, 192), and intends to continue so to do.

CONSTRUCTION OF WORKS BY THE CITY NOT NECESSARY.

The building of another system of water works by the city is not a public necessity, or required for the public convenience. Nor is there any evidence to that effect.

The resolution of the council of the 12th of April, 1883, declared it inexpedient for the city to construct and operate water works under the power granted in its charter; and there is no evidence that any change of circumstances has made it any more expedient now than then.

TWO SYSTEMS NOT MAINTAINABLE.

The population and requirements of the city are not sufficient to maintain two systems of water works (Wiley, p. 136–7; Cosgrove, pp. 192, 85).

WRONGFUL PURPOSE OF THE CITY.

The purpose of the city in building rival works is not to subserve any public need, but is part of a fraudulent scheme to oppress the Water Works Company, and destroy the value of its property, whereby irreparable loss and injury will result to the bondholders.

This wrongful purpose was manifest when on the 4th of September, 1884, only four days after the time for the construction of the works had expired, and when the company had expended $70,000 upon them, and when they were within about a month of their completion, the council, without notice to the company, and without specifying any particular cause other than that the works were not finished, passed a resolution (see Record, p. 50), declaring the contract with the company cancelled and forfeited, and thus sought to deprive it of the benefit of its works.

And so, after the test of the works on the 15th of January, 1885, when by reason of the bursting of a joint in the street pipe, and the accidental clogging of the valves of one of the pumps, the works failed to throw the requisite number of streams to the required height of 100 feet, the council, although informed of the accident and cause of failure, refused the company the benefit of another test of the capacity of the works (see Van Patten's communication, Record, p. 294).

So the purpose of the common council to oppress and injure the Water Works Company is shown by the statements of its members.

Pfaff, one of the members of the council, said (p. 267) on numerous occasions, before the extension of the city works, that it was the plan of the aldermen to drive the Water Works Company out of the city (see also p. 217).

Alderman Koeltz, while a member of the council in 1887, said (pp. 266), it was the design of the common council to complete the City Water Works with the view of driving the Water Works Company out of the city; that they would lay pipes in the same streets occupied by the pipes of the Water Works Company, for the purpose of competing with them and taking away their consumers.

Alderman Jacob De Spelder, while a member of the council in 1887, said (p. 267) repeatedly, that it was the

intention of the common council to drive the Water Works Company out of the city.

And the city is now carrying out this wrongful purpose of destroying the value of the company's works and the mortgage security of its bondholders.

It has extended its water pipes into streets occupied by the pipes and mains of the company's works; and is now supplying water therefrom in competition with the company's works, to private consumers at prices and rates (see complainant's Exhibit "No. 5," p. 307), as shown by Mr. Wiley (p. 141) at or below the cost of furnishing the same, and this testimony is not controverted.

By this competition the city has already drawn away a large amount of the company's patronage and reduced its yearly income more than $1000; and if the competition is continued, it will depreciate the value of the company's works one-half, or more—$35,000 or $40,000 at least (Cosgrove, p. 84).

CITY WORKS WATER SUPPLY.

The extension of the city works is not made on account of impurities or deleterious qualities in the water supplied by the company's works, nor for the purpose or with the expectation of furnishing better or purer water than that supplied by the company. No such evidence has been offered. The water supply for the company's works (as already shown) is from driven wells and a pipe line to the river at a place above the city and free from sewerage contamination; while the water supply for the city works is from driven wells and a pipe line to the same river, but at a place in the lower part of the city, subject to the contamination of sewerage and below the point where the city sewerage empties into the river, and it was a cause of complaint even before the building of the company's works that the water supplied from the driven wells in this locality by the city works was contaminated by sewerage (see Wiley's

test., pp. 129, 138; Cosgrove's test., pp. 188, 189); and the testimony of neither of these witnesses is controverted.

THE COMPETITION OF THE CITY ILLEGAL.

The statute (Howell, chap. 84, § 3124) provides that the city shall not impose any restrictions upon the company's charges for water supplied which will prevent its realizing on its capital stock an annual income or dividend of ten per cent, after paying the cost of all necessary repairs and expenses, interest on all moneys borrowed and five per cent per annum into sinking funds for the extinguishment of funded debts. And Wiley says (Rec., p. 137) that if the people of the city generally were takers of water from the company's works at the rates charged by it (see Exhibit "6," p. 313), its income therefrom, together with the rental agreed to be paid by the city would not, after making the payments above named, leave a dividend on its capital ($60,000, see Rec., p. 137) of more than one-tenth of one per cent. Certainly, then, the supplying of water by the city in competition with the company, at rates below costs, is in effect a restriction upon the company's charges, compelling it to quit business or supply water without profit, and is a violation of the intention and spirit if not of the letter of the statute.

THE COMPANY NOT AT FAULT.

But if, under all the circumstances, it can be said that the company has, in any respect, failed to perform its whole duty in the premises, it must be remembered

That its entire means have been expended in the construction of the works (see Wiley, p. 135–6).

That by its contract it has been obliged, since the completion of its work, to keep them running for the supply of the city and its inhabitants and public schools with water.

That the income of the works from private consumers has not been sufficient to pay the expenses of operating them.

That for the water supply furnished to the public schools and to the city for three years and upwards, it has always refused to pay, and never has paid any compensation to the company (Record, p. 140).

That by said resolution of the 4th of September, 1884, declaring the contract between the company and city canceled and forfeited, the council has put it out of the power of the company to make further loans of money for needful uses and improvements.

And now, after having thus impaired the credit of the company, and subjected it to financial embarrassment, and denied to it any compensation for the services it has rendered to the city, the council is seeking to utterly destroy the value of the company's works and the security of its bondholders.

The City Should Be Enjoined.

The council's resolution of forfeiture of September 4th was ineffectual.

No previous notice of an intention to pass it was given.

No notice of its passage was given until three weeks thereafter.

In the meantime the company had practically completed its works.

But if ever of any force it was waived.

November 3d the company gave notice to the council that the works were completed, and that the city would thereafter be charged with water rental under the contract (Record, p. 51).

January 15, 1885, the council joined with the company in a test of the works.

And although a committee of the council reported to it as to several matters as to which the committee deemed the works unsatisfactory, yet the council never communicated the report to the company, never made it or the test, or the condition of the works, or the quality of the water supplied,

the subject of any communication to or consultation with the company; in fact, never mentioned the subject to the company; never informed the company that it could not accept said works or water supply as in accordance with the contract, or that it would not take, receive or pay for water from it under the contract, nor did it ever notify the company not to deliver water to itself, its fire department or its public schools under said contract.

But on the contrary, from the day of said test for a period of about three years, until after the filing of the bill in this cause, the city drew its water supply from these works for fire protection in said city, and so used it at nearly every fire that occurred during that time, about 50 in all (see list of fires from day of test, January 15 to September 26, 1885, Record, pp. 157–8–9, and from October 8, 1885, to October 28, 1887, Record, pp. 32–3); and water also for its public schools from the fall of 1885 until after the filing of said bill without any complaint to the company of the quality or quantity of the water supplied, or of any failure as to the promptness, power or pressure with which it was furnished.

That the money for said bonds, and secured by said mortgage, was loaned in good faith and applied to the construction of said works and is still unpaid, and that the construction by said city of its works and the supplying of water therefrom is, as alleged in the bill, destructive of said mortgage security; and that the city should be enjoined as prayed.

That the circumstances of this case do not bring it within the rulings of this Court in the case of *The Farmers' Loan and Trust Co. vs. Galesburg*, 133 U. S., 156. But if the company has been in any respect in fault it is entitled to the more favorable consideration accorded in *The City of Joliet vs. Foster*, 27 Fed. Reporter, affirmed by this Court in 122 U. S., 639.

A. HOWELL,
Of Counsel for Appellant.

SUPREME COURT OF THE UNITED STATES.

THE BOSTON SAFETY DEPOSIT AND TRUST COMPANY *vs.* THE CITY OF GRAND HAVEN, and others.	October term, 1892. No. 113.

Copy of the Sections of Chap. 84, of the Michigan Statutes, referred to on pages 6, 7, 8, of Appellant's Brief, viz:

SECTION 3110: Sec. 1. *The People of the State of Michigan enact*, That whenever the common council of any city or incorporated village, or the municipal authority of any town in this state shall, by resolution, declare that it is expedient to have constructed works for the purpose of supplying such city, village or town, and the inhabitants thereof with water, but that it is inexpedient for such city, town or village, under the power granted in its charter, to build such works, it shall be lawful for any number of persons not less than five, to organize a company for the construction of such water-works, or for any company previously organized, to construct such water-works under the provisions of this act, and such corporation shall have all the powers and privileges prescribed in the act in regard to corporations, being chapter fifty-five, of revised statutes of eighteen hundred and forty-six, and chapter seventy-three, of the compiled law.

SECTION 3115: Sec. 6. Any corporation formed under this act shall have power to introduce water into any town, city, or village in the state, named in their articles of incorporation, and where the said corporation is located, for public or private buildings, or for other purposes; and for that purpose they are authorized and empowered to acquire and hold real estate in such town, city or village, or contiguous thereto, if necessary, and to erect and maintain all necessary and convenient buildings, fixtures, machinery, and other appurtenances incident or necessary, and to lay water pipes in and through the streets, avenues, lanes, alleys, or squares of said city, town or village, with the consent of the municipal authorities of the city, town or village, under such reasonable regulations as they may prescribe; and to make all ordinances and by-laws necessary and proper to carry into effect the foregoing powers; said corporation by their directors, agents, servants, or other persons employed, may enter upon the lands of any person or persons which may be necessary for said purposes, and may take the water from any springs, ponds, rivers, fountains or streams, and divert and conduct the same to said city, and may lay and construct any pipes, conduits, acqueducts, wells, reservoirs, or other works or machinery necessary or proper, and authorized for said purposes, upon any lands or property entered upon, purchased, taken or held. Said corporations may, as aforesaid, enter upon any lands, streets, highways, lanes, alleys, public squares, through which they deem it proper to carry water from said springs, ponds, rivers, fountains, streams, and reservoirs, and lay and construct any pipes, conduits, acqueducts, and other works for said purposes, leaving said lands, streets, highways, lanes, or public squares in same condition, as nearly as may be, as they were before said entry; but said company shall not, within the bounds of such city, town or village, lay and construct said pipes, conduits, acqueducts,

and other works, through any private garden, courtyard or building-lot, without the written consent of the owner thereof.

SECTION 3121: Sec. 12. It shall and may be lawful for the municipal authorities of any city, village or town in which any company is or shall be formed for the purpose of supplying such city, village or town, and the inhabitants thereof with water, to contract and agree with such company for the supply of water for public, municipal, or other purposes, and for the time and mode of payment, and may issue their obligations therefor.

SECTION 3124: Sec. 15. Whenever any such company shall have been duly organized, it shall be the duty of the common council of any such city or village, or the proper authorities of any such town, by ordinance, to grant to such company such right to the use of the streets, alleys, wharves (if any), and public grounds of said city, village or town, as shall be necessary to enable such company to construct the proper works for the supply of water for the use of such city, village or town, and its inhabitants; and the said common council may, in such ordinance, prescribe such just and reasonable terms, restrictions, and limitations upon such company, in reference to the manner of using streets, alleys, wharves and public grounds; to the charging and collecting of tolls, water rents, or other compensation for the supply of water to be furnished by such company to such city, town or village, and its inhabitants, as it may deem proper; to guard against the improper use of such streets, wharves and public grounds, and to protect said city, town or village, and its inhabitants from the imposition of undue or excessive rates or charges for the supply of water; but no such restriction shall be imposed which will prevent such company realizing upon its capital stock an annual income or dividend of ten per cent., after paying the cost of all necessary repairs and expenses, interest on

all moneys borrowed, and five per cent. per annum into sinking funds, for the extinguishment of funded debts.

SECTION 3125: Sec. 16. From and after the expiration of twenty-five years from the time of organization of such company, the common council of the city, town or village for which the said company may have erected its works, shall have the right and privilege of purchasing from such company, all its buildings, reservoirs, fixtures, apparatus and property of such company, with all its corporate rights and privileges, at such price as may be agreed upon; and in case of disagreement between the parties, the price to be ascertained and determined by five disinterested persons, not residents of said city or village, two of whom shall be chosen by said common council, two by the board of directors of such company, and the fifth by the four so chosen, who, when thus chosen and assembled, shall have power to determine, finally and conclusively, the amount which such town, city, or village shall pay for the rights, property, and franchises of such company as aforesaid.

SECTION 3126: Sec. 17. Any such city, town, or village may become a stockholder in any such company whenever the common council shall so direct, by resolution duly entered upon its minutes, after the question of so doing shall have been first submitted to the electors of said city, town, or village, in such manner as the common council may have prescribed, and the said electors shall have voted in favor thereof. Such resolution shall specify the number of shares to be taken, and shall require the mayor, president, or other municipal officer, to carry out the directions by subscribing for the number of shares indicated upon the books of the company. Any railroad, gas, manufacturing, or other corporation organized under any law of this state, and any insurance company organized under the laws of any state or county, doing business in this state, may subscribe for and own stock in such

company, and be entitled to all the rights and privileges, and shall be subject to all the liabilities of stockholders. It shall be lawful for any such city, town, or village to issue bonds, payable at such time as the common council shall direct, and bearing interest at a rate not exceeding eight per cent. per annum, and to negotiate the same upon the best terms they can obtain. Such cities, towns, and villages shall have power, in addition to that given by their charters, to levy taxes not exceeding two per cent. on the assessed valuation per annum, sufficient to meet the principal and interest falling due on such bonds.

SECTION 3127: Sec. 18. Any such company shall be deemed to be fully organized whenever half the capital stock named in its articles of association shall have been in good faith subscribed, and ten per cent. thereof paid in, and may thereupon enter on the work of construction; and in order to raise moneys for that purpose, it shall have power to borrow money, to issue bonds, or other evidence of indebtedness, to execute mortgages, or trust deeds, as may be deemed necessary for that purpose; and it may also issue a preferred stock, if a majority of the stockholders of the company shall vote that it is advisable so to do; but in the case that such city, town or village is a stockholder, no such mortgage, trust deed, or issue of preferred stock shall be valid without the assent thereto of the common council of said city or village, or the municipal authorities of such town.

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